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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____.

NICOLAE DRAGAN, et al.,

Petitioners,

-vs-

JOHN and SYLVIA MILLER,

Respondents

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Seventh Circuit

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QUESTION PRESENTED

Whether a federal diversity court has jurisdiction to entertain an independent action in tort for the wrongful interference with an inheritance, cognizable under the law of the State, where the probate proceedings have been terminated and the alleged wrongdoer has obtained the property comprising the claimed inheritance through a duly probated will?

PARTIES TO THE PROCEEDING

The parties to this proceeding are Nicolae Dragan, Liviu Dragan, Doina Moeter, Ana Dragan, Silvia Dragan, Florin Dragan, Ana Dragan, and the respondents.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No.

NICOLAE DRAGAN, et al.,

Petitioners,

vs.

JOHN W. MILLER and SYLVIA MILLER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Petitioners, Nicolae Dragan, Liviu Dragan, Doina Moeter, Ana Dragan, Silvia Dragan, Florin Dragan and Ana Dragan, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the

Seventh Circuit entered in this proceeding on June 4, 1982.

OPINIONS BELOW.

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The Report and Recommendation of the Magistrate, and the Orders of the District Court for the Northern District of Illinois, Western Division, are attached hereto in the Appendix.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 4, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

1. Section 1332, Diversity of citizenship.

(a) The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between --

(b) citizens of a State, and foreign states or citizens or subjects thereof;

2. Section 8-1, Illinois Probate Act of 1975, Ill. Rev. Stst. Ch. 110½. See infra, page 5.

STATEMENT OF THE CASE.

The District Court dismissed the Petitioners' diversity complaint for lack of subject matter jurisdiction. The Court of Appeals affirmed the dismissal.

The complaint alleges that the Petitioners are citizens and residents of Romania and the sole heirs at law of Walter Dragan who died testate, leaving his entire estate to John W. Miller and Sylvania Cibu Miller, residents of Illinois, Respondents herein; that the Respondents, who are unrelated to the decedent, improperly importuned and wrongfully influenced the decedent when he was ill and enfeebled, to disinherit the Petitioners. It is further alleged that but for the wrongful actions and conduct of the Respondents, the Petitioners would have succeeded to the property and estate of the decedent as the natural objects of the decedent's bounty.

The Petitioners request that a trust

be imposed by the Court upon the properties obtained by the Respondents as a result of their wrongful acts, and that the Respondents be declared trustees thereof for the benefit of the Petitioners. In addition, the Petitioners seek punitive damages and the allowance of attorney fees for the prosecution of the action.

The District Court found that the Petitioners are improperly seeking to relitigate a will contest action in the federal court. The Seventh Circuit recognized the action as being "a tort for wrongful interference with an expectancy in a decedent's estate", cognizable under Illinois law; it held nevertheless that the "tort action must be brought as an ancillary proceeding, under Section 8-1 of the Illinois Probate Act to the original proceeding." Section 8-1 of the Probate Act of 1975, as pertinent to this case, provides:

"Within 6 months after the admission

to probate of a domestic or foreign will in any court of this State, any interested person may file a petition in the proceeding for the administration of the testate's estate to contest the validity of the will." (Ill. Rev. Stat. 1977, Ch. 110½, par. 8-1).

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Has Misconstrued and Misapplied the Decisions of this Court Concerning Diversity Jurisdiction of the Federal Courts in Suits Inter Partes Relating to a Decedent's Estate.

This court has held that the exercise of jurisdiction over property by one court does not prevent other courts from rendering any judgment not in conflict with that court's authority to decide questions within its jurisdiction and to make effective such decisions by its control of the property. Sutton v. English, 246 U.S. 199 (1918), Gaines v. Fuentes, 92 U.S. 10. This principle was applied in Markham v. Allen, 326 U.S. 490 (1946), where the Court

sustained federal jurisdiction on the ground that the judgment did not interfere with the "orderly administration of the decedent's estate in the state probate court" but simply involved the Alien Property Custodian's right in the property to be distributed.

2. The Decision Below Raises Significant and Recurring Problems Concerning Efforts to Invoke the Diversity Jurisdiction in the Area of Probate and Decedent's Estates.

After stating that the probate exception to diversity jurisdiction "is one of the most mysterious and esoteric branches of the law of federal jurisdiction", the Seventh Circuit chose to sidestep a direct confrontation with the issue in the circumstances of this case and, instead, sought justification for its conclusion in a lateral manner. Although the Circuit Court conceded that Illinois recognizes a tort

for wrongful interference with an expectancy in a decedent's estate, it determined nevertheless that the Petitioner's tort action must be brought in the state probate court as an ancillary proceeding, under Section 8-1 of the Probate Act, to the original proceedings in probate. Somehow the court was impelled to the conclusion that the Petitioner's action is, in reality, a will contest suit brought under the guise of a tort action. In the final analysis, the Seventh Circuit agreed with the findings of the Magistrate, ratified by the district judge, that the complaint is, in effect, an action to contest the validity of a will, which is within the exclusive province of the probate court of Illinois. Just how the Petitioner's tort action had been transformed into a "pure" probate proceeding is unexplained.

The area of probate and decedent's estates continues to present a divergence

of views among the district and circuit courts on the question of subject matter jurisdiction. Though federal courts choose not to exercise their jurisdiction in this area for numerous reasons, there are certain guiding principles which have emerged and are being considered to aid the court in determining whether to entertain or decline jurisdiction. One is the principle that federal courts do not have the power to probate wills, or to interfere with or impede probate proceedings, or to assume general jurisdiction of the probate or control of property in the custody of the state probate court. Once a diversity suit can be characterized as involving "pure" probate matters, the desire of federal courts is to avoid interference with state probate proceedings. A standard used by the courts to determine federal jurisdiction is whether under state law the dispute would be cognizable only by the

probate court. If so, the parties will be relegated to that court; however, where the suit merely seeks to enforce a claim inter partes, enforceable in a state court of general jurisdiction, federal jurisdiction will be assumed. Lamberg v. Callahan, 455 F.2d 1213, 1216 (2d Cir., 1972); Bassler v. Arrowood, 500 F.2d 138 (8th Cir. 1974). This approach was recognized by the Seventh Circuit.

On May 18, 1982, the Seventh Circuit decided the case of Susan Kemper Hamilton v. Arthur C. Nielsen, Jr., and American National Bank and Trust Co., unreported, being case number 81-1935. A beneficiary of a testamentary trust sued the executor for mismanagement of estate funds. The Seventh Circuit sustained diversity jurisdiction, having found that the action was not one in which the district court would interfere with or impede the probate proceedings. The Court noted that under Illi-

nois law, the probate division and the law division are simply divisions of the same constitutional court of general jurisdiction, and that both courts have equal and concurrent jurisdiction over the appointment ofan administrator. The Court below declared, significant to the issue herein, that ". . . so long as the federal court is faithfully applying Illinois law its decision will not have a systematically different effect than if the action had been brougnt in the corresponding state court of general jurisdiction." Illinois is one of many states which have abolished separate probate courts and vested the probate jurisdiction in its courts of general jurisdiction. See Ill. Const. Art. 6, Sec. 9; Alfaro v. Meagher, 27 Ill. App. 3d 292, 295-6, 326 N.E.2d 545, 548 (1975).

It is clear that "the exception from the diversity jurisdiction as to probate matters is far from absolute." C. Wright,

Handbook of the Law of Federal Courts, Section 25, at page 98, (3rd Ed. 1976). Some federal courts decline jurisdiction upon the mere mention of the word "probate". Miami County National Bank v. Bancroft, 121 F.2d 921 (10th Cir. 1941). Other construe the meaning of probate quite narrowly to limit the scope of the exception. Griffith v. Bank of New York, 147 F.2d 899 (2nd Cir. 1945); Phillips, Nizer, Benjamin, Krem & Ballon v. Rosenstiel, 490 F.2d 509, 514 (2d Cir. 1973); Akin v. Louisiana National Bank of Baton Rouge, 322 F.2d 749, 751 (5th Cir. 1963).

Admittedly, a federal court generally has no power to set aside the probate of a will since probate courts have exclusive jurisdiction over wills. But, sitting in equity, the federal court may create a constructive trust in the property obtained as a result of the probate of the will, and require the defendants, as constructive

trustees, to account for and to transfer the property received under the probate decree to the petitioners, if the court finds they are entitled to it. Thus, federal courts under diversity jurisdiction do have subject matter jurisdiction over suits that arise out of or pertain to probate proceedings. The generally accepted view illustrating this principle was enunciated by the Fifth Circuit in Dewitt v. Duce, 599 F.2d 676 (1979). The court there held:

> "Complaint, which alleged that defendants improperly, systematically fraudulently acted to influence testator to revoke will naming plaintiffs as substantial beneficiaries and to execute instead a new will for defendants' benefit, and which was not in place of challenge to probate but rather encompassed independent tort claim for intentional interference with inheritance, was sufficient on its face to confer subject matter jurisdiction under Florida law, which recognizes independent cause of action based upon such a claim."

Especially persuasive and pertinent to our issue herein is the Fifth Circuit's

statement:

> "Although the complaint does not so state, Arthur Welch's will has probably completed Florida proceedings, so the district court's entertainment of this action will not interfere with Florida's orderly administration of the estate of its decedents. We reject the defendants' contention that this is a mere will contest." (underscoring ours)

Petitioners seek the imposition of a constructive trust based upon the wrongful actions of the respondents in eliminating them as the lawful successors to the property of their ancestor. As we have seen, Illinois recognizes an independent action in tort for the intentional interference with an inheritance. The Restatement of Torts (Secon), Section 774 (1979), defines the tort as follows:

> "One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift."

It is evident, we believe, that the statutory right to challenge the validity of a will by an action in the probate proceedings of a decedent's estate does not preclude the Petitioner from pursuing an in personam remedy against the respondents. The Petitioners may institute an independent action in tort for damages, or an action in equity to impress a trust (constructive trust) in any court of competent jurisdiction. The Restatement of the Law of Judgments, American Law Institute, states the applicable rule as follows: (Section 114)

> "Probate. Although a court of equity normally has no power to set aside the probate of a will since probate courts usually have exclusive jurisdiction over wills, equitable relief may be granted against the effect of a probate decree, even though probate decrees are made conclusive by statute . Thus a court of equity may create a constructive trust in property obtained as the result of the probate of the will; it may require the constructive trustee to deliver such property

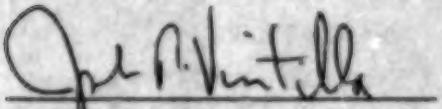
> or account for its proceeds. Likewise, a court of equity may require an administrator to account for property for which he previously obtained a discharge in the probate court; and it may order persons who have received property under a probate decree to transfer it to others who, the court of equity finds, are entitled to it."

We believe the time has come for this Court to enunciate a clear and definitive ruling on the subject matter of diversity jurisdiction in the area of probate and decedents' estates. The judge-made probate exception to federal diversity jurisdiction needs attention and resolution by this Court.

Finally, the correctness of the decision below is open to serious question.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,



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In the

United States Court of Appeals

For the Seventh Circuit

No. 81-1903

NICOLAE DRAGAN, et al.,

Plaintiffs-Appellants,

v.

JOHN and SYLVIA MILLER,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80 C 0131—Stanley J. Roszkowski, *Judge.*

SUBMITTED APRIL 20, 1982—DECIDED JUNE 4, 1982

Before WOOD, ESCHBACH, and POSNER, *Circuit Judges.*

POSNER, *Circuit Judge.* The complaint in this diversity case, filed in September 1980, alleges that the plaintiffs are residents of Rumania and the nieces and nephews—and heirs by intestacy—of Walter Dragan; that Dragan died in Illinois in June 1979 at the age of 87, leaving a will that bequeathed his entire property to the defendants; and that the defendants, who are not related to Dragan, had improperly influenced him when he was "ill and enfeebled" to will his property away from the plaintiffs. The complaint asks that the defendants be declared constructive trustees of Dragan's estate for the plaintiffs' benefit. The district court dismissed the complaint on the ground that it was within the probate exception to federal diversity jurisdiction.

The probate exception is one of the most mysterious and esoteric branches of the law of federal jurisdiction. The usual account given of it is historical. The Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78, conferred on the federal courts, in diversity cases, concurrent jurisdiction over "all suits of a civil nature at common law or in equity." The counterpart language in the current grant of diversity jurisdiction to the federal courts, "all civil actions," 28 U.S.C. § 1332(a), may seem broader, but it was intended to be synonymous with the language quoted above from the Judiciary Act of 1789. See Reviser's Note to 28 U.S.C. § 1332 (1976). Now "suits of a civil nature at common law or in equity" meant in eighteenth-century England suits brought in either the common law courts or the chancery court; and it is argued that since the probate of wills and the administration of intestate estates were within the exclusive jurisdiction of the ecclesiastical court, they were not included in the Judiciary Act's grant of jurisdiction to the federal courts. See, e.g., *Markham v. Allen*, 326 U.S. 490, 494 (1946). One does not have to be an expert historian to spot the flaws in this reasoning. First, there was no ecclesiastical court in America, and it is not obvious why the language of the Judiciary Act of 1789 should be taken to refer exclusively to English rather than American courts. Someone should investigate the jurisdiction of American equity courts in the eighteenth century relative to that of any specialized probate courts that might have corresponded to the ecclesiastical court in England; no one has. Second, the scope of the exclusive jurisdiction of the ecclesiastical court is very uncertain. In particular, it appears not to have extended beyond personal property; apparently the court of chancery had extensive jurisdiction over the inheritance of land. See, e.g., *Barnesly v. Powel*, 1 Ves. Sen. 284, 286-87, 27 Eng. Rep. 1034, 1036 (Ch. 1749). The complaint in this case alleges that Dragan's estate included a valuable piece of land.

But however shoddy the historical underpinnings of the probate exception, it is too well established a feature of our federal system to be lightly discarded, and by an

inferior court at that, even if we were to reject as artificial the proposition that Congress's failure to repeal the exception when reenacting from time to time the grant of diversity jurisdiction to the federal courts indicates congressional acquiescence. So we accept, as settled law that we have no wish to disturb no matter how dubious its historical pedigree, the statement of the Supreme Court in the *Markham* case that "a federal court has no jurisdiction to probate a will or administer an estate . . . ." 326 U.S. at 494. But this is not what the court below was asked to do. Dragan's will was admitted to probate in an Illinois court; the court directed the distribution of his estate in accordance with the terms of the will; the estate was distributed to the people who are the defendants in this action; and with that the probate proceeding ended. The plaintiffs do not want to enjoin or reopen that probate proceeding or reach property in the hands of the state court. There is no such property. The defendants have it, and the plaintiffs want to get it out of their hands. So not only does this lawsuit not ask the federal court to probate a will or administer an estate, but it does not seek to "interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." *Markham*, *supra*, 326 U.S. at 494. In *Markham*, the Alien Property Custodian had succeeded to the interests of German nationals to whom the decedent had willed his property, but a state court had disregarded the will and given the decedent's property to his heirs on the basis of a California statute that forbade the devise of property to certain aliens. The Alien Property Custodian brought suit against the heirs to recover the decedent's property on the ground that the will was valid notwithstanding the California statute. The Supreme Court held that the federal district court had jurisdiction over the suit. Superficially, at least, the present case is similar.

But before we conclude that *Markham* controls we ought to consider the purposes that the probate exception to federal diversity jurisdiction might be thought to serve. Even if the framers of the Judiciary Act of 1789

intended to deny to the federal courts jurisdiction over the sorts of cases that in England were heard in the ecclesiastical court, they presumably had some reason for doing this besides the name of the court. And the exception probably would not have persisted as long as it has without a better reason than that it may have been implicit in the first judiciary act or that the framers of Article III of the Constitution may have intended to limit the jurisdiction of the federal courts to the types of cases adjudicated in the English common law and chancery courts. Rigidly historicist interpretations of the Constitution have not been much in vogue for generations.

Several practical reasons for the probate exception, of varying weight, occur to us. One is the promotion of legal certainty. If an issue may end up being litigated in either a state or a federal court, its resolution is less certain, less predictable, than if it can be litigated in one or the other forum only, even if the same substantive law is applied. Certainty is desirable in every area of the law but has been thought especially so with regard to the transfer of property at death. See, e.g., Restatement (Second) of Conflict of Laws, § 11, comment *c* (1971). There are obstacles enough to effectuating testimonial intentions; legal uncertainty ought not to be one of them. This is an argument for exclusive state jurisdiction, since the federal courts cannot exercise jurisdiction in relation to decedents' estates except in diversity cases. But it does not strike us as a very powerful argument. If there is diversity of citizenship among the claimants to an estate, the possible bias that a state court might have in favor of citizens of its own state might frustrate the decedent's intentions; it is just such bias, of course, that the diversity jurisdiction of the federal courts was intended to counteract. It is worth noting that the plaintiffs in this case are nonresidents, and the defendants residents, of Illinois, where this case would have been tried had the plaintiffs not invoked federal jurisdiction.

A more compelling reason for the probate exception is judicial economy. When a person dies, his will has to be

admitted to probate somewhere, or if he dies intestate the control of his property has to be vested in some court initially, and it is hard to imagine in either case how the initial jurisdiction over the decedent's estate could be elsewhere than in a state court. Only as the probate proceeding unfolds will the prerequisites of diversity jurisdiction—the diverse citizenship of the contestants and the minimum required amount in controversy—appear. If the probate proceeding thus must begin in state court, the interest in judicial economy argues for keeping it there until it is concluded. (A similar argument could of course be made against removal of cases from state to federal court other than immediately after the state-court action began, but the argument has been rejected by Congress. See 28 U.S.C. § 1446(b).) But this begs the question, when is the probate proceeding concluded? The practical answer, which we elaborate below, is, when there is no longer any substantial judicial diseconomy from conducting further litigation relating to the decedent's estate in a different court from the one where the will was admitted to probate or the intestate estate administered.

If for the above reasons, especially the second (judicial economy), the state courts are going to have a measure of exclusive jurisdiction in probate matters, federal courts will not have much experience in adjudicating certain issues—those characteristic of though not necessarily limited to probate proceedings, in particular issues of testamentary capacity. If so, there is an argument—call it the argument from relative expertness—for confining the adjudication of probate-type issues to state court even when they arise in proceedings that otherwise might not be clearly classifiable as probate proceedings. But this argument like the first seems something of a makeweight. With the explosion in recent years of "will substitutes" such as life insurance and joint savings accounts, the federal courts in diversity cases presumably have acquired at least modest experience with issues of testamentary capacity of the kind that arise in probate cases.

Although the foregoing considerations are general in nature, they do not compel the conclusion that federal jurisdiction in relation to decedents' estates should have the identical scope in every state. The force of the considerations will vary from state to state depending on particular judgments made by each state and incorporated in its probate laws. If a state creates a specialized cadre of judges to administer its probate jurisdiction, this will be a reason for interpreting the probate exception to the federal diversity jurisdiction broadly in that state; the argument from relative expertness will have greater force in such a state than in one where authority in probate matters is exercised by courts of general jurisdiction. Or if a state has decided that a certain issue may be raised only in the original probate proceeding, this will strengthen the argument from judicial economy by indicating that the state believes that bifurcated consideration of probate-related issues would produce judicial diseconomy. Hence our judgment in the present case may depend to a significant extent on how Illinois has decided to configure its probate jurisdiction.

The practical approach we propose to take in this case is in accord with leading precedents, notably *O'Callaghan v. O'Brien*, 199 U.S. 89 (1905), a case that, as we shall see, bears a strong factual resemblance to the present case. After noting that "matters of pure probate, in the strict sense of the words, are not within the jurisdiction of courts of the United States," the Supreme Court went on to hold that even if a state allowed suits in law or equity to set aside a will, the federal courts could not entertain such a suit "when the remedy to set aside afforded by the state law is a mere continuation of the probate proceeding; that is to say, merely a method of procedure ancillary to the original probate, allowed by the state law for the purpose of giving to the probate its ultimate and final effect." *Id.* at 110. The concept of "ancillarity," in this as in other areas of the law, see, e.g., Bork, The Antitrust Paradox: A Policy at War with Itself 26-30 (1978) (discussing the concept of "ancillary" restraints of trade), is an invitation to apply a concept—here the concept of probate—pragmatically.

The suit by the plaintiffs in this case is not a pure matter of probate. Historically in Illinois a probate court did not have jurisdiction to set aside a will on the ground of undue influence, which is what the plaintiffs are in effect asking here; a person who wanted to challenge a will on that ground had to bring a separate action in a court of general jurisdiction. See, e.g., *Shepherd v. Yokum*, 323 Ill. 328, 334-35, 154 N.E. 156, 159 (1926); *Berndtson v. Heuberger*, 21 Ill. 2d 557, 562-63, 173 N.E.2d 460, 463 (1961). Although Illinois has now abolished separate probate courts, as we had occasion to note just the other day in *Hamilton v. Nielsen*, No. 81-1935, slip op. at 2-3 (7th Cir. May 18, 1982), the scope of the probate jurisdiction remains unchanged, see *Ruffing v. Glissendorf*, 41 Ill. 2d 412, 416-17, 243 N.E.2d 236, 238-39 (1969), much as the merger of law and equity left unchanged the scope of equity jurisdiction for such purposes as deciding whether a party has a right to a jury trial.

We must therefore consider whether this suit is "ancillary" to probate in the practical sense that allowing it to be maintained in federal court would impair the policies served by the probate exception to federal diversity jurisdiction. With respect to legal certainty, it is significant that what the plaintiffs want is a declaration that Dragan's will was invalid and that his estate should pass to them under the Illinois intestacy statute; this is not the form of the action but would be its practical effect if it succeeded. If such a suit can be maintained in federal court, testators whose heirs or legatees can satisfy the diverse-citizenship and amount-in-controversy requirements of federal diversity jurisdiction will not know whether the validity of their wills will be decided by a state or by a federal court. This was true to some extent in *Markham* as well, but the only issue regarding the validity of the will in that case was a pure question of law relating to the California statute; and it can be argued that there is a greater probability that this issue would be decided the same way whether by a state court or by a federal court than that a federal court would decide a factual question, such as whether

there was undue influence over a testator, the same way that a state court, with its different procedures, would decide it. But we do not place much weight on this factor. As mentioned earlier, against it must be set the fact that the plaintiffs are nonresidents suing residents: the possibility of state-court bias, the conventional though perhaps archaic foundation of the diversity jurisdiction, cannot be entirely excluded.

The interest in judicial economy, however, argues very strongly for confining this lawsuit to state court. The Illinois Probate Act of 1975, Ill. Rev. Stat., ch. 110½, § 8-1, establishes a procedure for will contests that is the exclusive procedure by which a will contest can be litigated in an Illinois court. See, e.g., *Blyman v. Shelby Loan & Trust Co.*, 328 Ill. 415, 421, 47 N.E.2d 706, 709 (1973). A will contest is initiated by filing a petition within six months of the admission to probate of the will to be contested. The petition must be filed in the proceeding to probate the will and the effect of the filing is to extend the probate proceeding until the will contest is completed. See *Estate of Lynch*, 103 Ill. App. 3d 506, 507-09, 431 N.E.2d 734, 736-37 (1982). Behind this procedure lies, it would seem, a judgment that all issues relating to the validity of a will ought to be decided as part of the initial probate proceeding, before the same judge, and before his recollection of the will has faded. If the plaintiffs in this case are free to contest the will in a different court, that will undermine what is not merely a hypothetical interest in judicial economy but almost certainly the interest that actually moved the Illinois legislature to give its will-contest procedure the form it did and to make that procedure exclusive. When the Supreme Court in *O'Callaghan* held that will-contest actions under Washington state law were ancillary to probate proceedings and so could not be brought in federal court under the diversity jurisdiction, one of the factors it relied on was that under state law such an action could be brought only in the court where the will had been admitted to probate. See 199 U.S. at 114; see also *Sutton v. English*, 246 U.S. 199, 207-08 (1918).

Finally, the issue that the plaintiffs are asking the federal court to decide in this case—the issue of undue influence over the testator—is one that state judges have greater experience with than federal judges. From this standpoint whether the issue is litigated in a "pure" probate proceeding or, as in Illinois, in an ancillary proceeding is immaterial. Therefore, if there is some residual uncertainty that this case would be functionally a probate proceeding if brought in state court under section 8-1 of the Illinois Probate Act, the nature of the substantive issue in the case should dispel it.

We would have no doubt that this suit was within the probate exception to the diversity jurisdiction were it not for the labels that the plaintiffs have attached to their complaint. Instead of just claiming that the will is invalid and therefore the estate should pass to them, the heirs, by intestacy—a claim that could be litigated only in a will contest under section 8-1—they claim that the defendants have committed a tort against them by using undue influence to procure the will that was admitted to probate and as a result have deprived them of the inheritance they would have had if Dragan had died intestate. If we are correct in using a practical approach to defining the scope of the probate exception, labels would not alter our result. Whatever the plaintiffs call their action it is in effect one to declare Dragan's will invalid because of undue influence and to have his property pass to them under the Illinois intestacy statute; and while such an action cannot interfere with the Illinois probate proceeding now that it has ended, if it were brought in federal court it would frustrate the objectives that we have said lie behind the probate exception and that, we surmise, explain its remarkable persistence.

But if Illinois allows the labels that a plaintiff puts on his suit to determine whether it must be brought under section 8-1, then the case for exclusive state jurisdiction is weakened. The argument from judicial economy would collapse because if the state allows an action challenging the validity of a will to be brought as a

separate tort action before a different judge from the one who probated the will, it is hard to see why that different judge may not be a federal judge if the prerequisites of diversity jurisdiction are satisfied. The arguments from legal certainty and relative expertness would survive, but in an attenuated form, and they are not powerful arguments to begin with. True, with Illinois having abolished separate probate courts, a state tort action would at least be brought before the same kind of judge who had admitted the will to probate, though not necessarily the same individual; on the other hand, that abolition also reduces any argument for greater expertness based on specialization.

But we do not have to decide whether in these circumstances the probate exception would still be applicable. Like most states, Illinois recognizes a tort of wrongful interference with an expectancy in a decedent's estate; but where, as in this case, the interference consists of having procured a will that disinherits the plaintiff, it appears that the tort action must be brought as an ancillary proceeding, under section 8-1 of the Illinois Probate Act, to the original proceeding. *Lowe Foundation v. Northern Trust Co.*, 342 Ill. App. 379, 96 N.E.2d 831 (1951), the leading case in Illinois on the wrongful-interference tort, was so brought. See also *Jarmuth's Estate*, 329 Ill. App. 619, 70 N.E.2d 336 (1946); *Estate of Nelson*, 132 Ill. App. 2d 544, 270 N.E.2d 65 (1971). *Nemeth v. Benhalmi*, 99 Ill. App. 3d 493, 425 N.E.2d 1187 (1981), was not; but since in that case no will had been admitted to probate, an ancillary proceeding was not possible. In the present case, of course, it was.

True, the Illinois courts have not *said* that an action for tortious interference based on the alleged invalidity of a will may be brought only in the section 8-1 format. But they have had no occasion to say this, since the only reported case, *Lowe Foundation*, *supra*, was brought as one. We have to guess whether the Illinois courts would allow section 8-1 to be circumvented by calling a will contest an action in tort. The Illinois courts have rejected all other attempts that have been made to

get around the exclusivity of section 8-1 by relabeling. See *Blyman, supra*, which was brought as an action for the partition of real estate; *Ruffing, supra*, brought as an action for relief from a probate judgment; and *Estate of Moerschel*, 86 Ill. App. 2d 482, 407 N.E.2d 1131 (1980), brought as a declaratory-judgment proceeding. We think they would reject this one as well.

AFFIRMED.

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B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

June 4, 1982

Before

Hon. Harlington Wood, Jr., Circuit Judge

Hon. Jesse E. Eschbach, Circuit Judge

Hon. Richard A. Posner, Circuit Judge

NICOLAE DRAGAN, et al.,	)	No. 81-1903
	)	
Plaintiffs-Appellants,	)	
	)	
-vs-	)	
	)	
JOHN and SYLVIA MILLER,	)	
	)	
Defendants-Appellees.	)	

This cause came before the Court for decision on the record from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

NICOLAE DRAGAN, et al.,	)	CIVIL ACTION
	)	
Plaintiffs,	)	NO. 80 C 0131
	)	
v.	)	REPORT AND
	)	RECOMMENDATION
JOHN W. MILLER and	)	
SYLVIA CIBU MILLER,	)	
	)	
Defendants.	)	

Original complaint was filed on September 29, 1980 alleged wrongful interference with inheritance. On October 6, 1980 a motion to dismiss was completed by November 1, 1980 and the matter is before the Magistrate for report and recommendation.

The complaint filed on behalf of the plaintiffs is unique and imaginative. It alleges the jurisdiction of this court under 28 USC § 1331 alleging that the plaintiffs are citizens of Romania and that the defendants are citizens and residents of the State of Illinois and that the matter in controversy

exceeds $10,000. Plaintiffs are the sole heirs of one Walter V. Dragan who died in Dixon, Illinois, apparently on June 21, 1979 at the age of 87 years old. He had no spouse that survived him and the plaintiffs claim to be entitled to his estate under the laws of descent and distribution of the State of Illinois. The defendants are not related to the decedent, but apparently knew the decedent in Dixon, Illinois. At the time of his death Walter Dragan was in a nursing home in Dixon, Illinois according to the complaint. It is alleged that while he was interned in the nursing home the defendants engaged in a systematic course of conduct which was designed to deprive the plaintiffs of their rightful inheritance and as a result of the actions of the defendants Walter V. Dragan executed a will on November 17, 1976 and subsequently a codicil on January 31, 1978. Through these two instruments the defendants, who are not related to decedent, received the bulk of the decedent's estate, including a farm which is

alleged to have a market value in excess of $250,000.

The motion to dismiss filed on behalf of the defendants alleges that the complaint is really an attempt to contest the validity of the will and that such a contestation is handled by the statutes of the State of Illinois, which is specifically Ill. Rev. Stat. ch. 110 1/2, § 8-1, and that under said statutes the U.S. District Courts have no jurisdiction since this is solely a probate matter.

It is the contention of the plaintiffs that this is not a probate matter and that this is not a lawsuit to contest a will or to set aside a will, but this is in fact an independent action for wrong which has been committed against the plaintiffs. It is in fact, according to the plaintiffs, a tort lawsuit about a tortuous, wrongful and willful interference with inheritance.

The initial question, therefore, that the court has to grapple with is whether or not such a tort is recognized in the State of

Illinois and if it is not recognized should it be. THe Magistrate has found no Illinois case nor has any Illinois case been cited to the Magistrate which recognizes the tort of wrongful interference with inheritance. However, that does not end the inquiry. The general approach of the Illinois judiciary has always been that a court must show imagination to allow one injured to recover for a wrongful act inflicted upon him. As the Illinois Constitution, Article I, § 12 states:

> Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.

Illinois courts have long recognized that the mere fact a doctrine has not been previously invoked is no reason to deny a remedy, Suvada v. White Motor Co., 32 Ill.2d 612, 210 N.E. 2d 182 (1965), Renslow v. Mennonite Hospital, 67 Ill.2d 348, 10 Ill.Dec. 484, 367 N.E.2d 1250 (1977), Nanda v. Ford Motor Co., 509 F.2d

213 (7th Cir. 1974). Therefore, the Magistrate believes that the judicial inquiry is whether or not there is an adequate remedy for the injustice which may have been done to these plaintiffs.

Illinois Revised Statutes set up a specific system for contesting a will either because of undue influence or because of a situation where the testator did not have sufficient mental capacity to make a will. Ill. Rev. Stat. ch. 110 1/2, § 8-1 states as follows:

> Within 6 months after the admission to probate of a domestic or foreign will in any court of this State, any interested person may file a petition in the proceeding for the administration of testator's estate to contest the validity of the will. The right to institute or continue a proceeding to contest the validity of a will survives and descends to the heir, legatee, representative, grantee or assignee of the person entitled to institute the proceeding.

In 1955 the Second Illinois Appellate District had before it the case of Yung v. Peloquin,

6 Ill. App. 2d 258 (2nd Dist. 1955). In that case the principal issue was whether or not the plaintiff was an interested person within the meaning of the Probate Act and, therefore, entitled to contest the validity of a will. The court made some observations which the Magistrate believes are applicable to the pending case.

> The requirements of the Probate Act dealing with will-contest proceedings are jurisdictional; therefore, the requirement that the contestant be an interested person within the meaning of Section 90 is jurisdictional.

The court stated further:

> The right to contest a will is not a vested one. Independently of the statute no such right has ever been recognized by the courts of this State. The right, therefore, can be exercised only in the manner and within the limitations prescribed by the statute. Id. at 261.

In addition, in 1979 in the case of Matter of Estate of Watts, 23 Ill. Dec. 795 (4th Dist. 1979) the Fourth Illinois Appellate District made some comments in regard to the statutes

which are involved in this case. The court stated:

> We conclude that since no appeal was taken from the order admitting the will to probate and no suit to contest the validity of the will was instituted within the six-month period prescribed by statute, the trial court, and, hence, this court, lacked jurisdiction to hear any question regarding the validity of the will. Will contests and probate proceedings are dependent entirely upon statutory authority and none exists for appeal of the question of validity of the will at this point. Id. at 796.

The Magistrate feels compelled to follow the rulings of the two Illinois Appellate Courts. If this court were to recognize the tort of wrongful interference with inheritance it would to some extent be litigating the validity of the will and codicil. The Magistrate, therefore, recommends that the motion to dismiss be allowed.

If the District Court feels there is merit to recognizing the tort suggested by plaintiffs, the Magistrate still believes the complaint should be dismissed on the grounds

of abstention. Illinois courts should, if possible, make new Illinois laws. If the District Court declines to follow the first recommendation of the Magistrate, the second recommendation of the Magistrate is that this case be dismissed under grounds of "abstention" to allow this case to be filed in the state court so that the state courts of the State of Illinois may determine whether or not they want to recognize a new judicially created tort called "the tort of wrongful interference with inheritance."

MAY 1, 1981.

/s/ P. Michael Mahoney
United States Magistrate

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

Hon. P. MICHAEL MAHONEY, Magistrate

Case No. 80 C 0131 Date: May 1, 1981

DRAGAN, et al., v. JOHN W. MILLER, et al.

REPORT AND RECOMMENDATION

It is the report and recommendation of the Magistrate that the motion to dismiss be allowed. DRAFT. Each party is given ten (10) days within receipt of this recommendation to file any written objections with the office of the Clerk, Room 252, Federal Bldg., 211 So. Court, Rockford, IL., addressed to Judge Stanley J. Roszkowski.

D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

Honorable STANLEY ROSZKOWSKI, Judge

Case No. 80 C 0131 Date: May 22, 1981

DRAGAN, et al., v. MILLER, et al.

This Court having carefully read the Report and Recommendation of the Magistrate as well as having closely surveyed any possible applicable law hereby adopts the Magistrate's report and recommendation.

Accordingly, it is ordered that defendant's motion to dismiss be and the same is hereby denied.

Honorable STANLEY ROSZKOWSKI, Judge

Date: May 26, 1981

This Court's order of May 22, 1981 is hereby corrected to read:

"Accordingly, it is ordered that defendant's motion to dismiss be and the same is hereby granted."